Filed 4/24/19 Estate of Watson CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

Estate of DENNIS I. WATSON, Deceased.	
KIMBERLY D. MILLER, Petitioner and Respondent, v. CYNTHIA D. WATSON, Objector and Appellant.	F076981 (Super. Ct. No. 16CEPR00984) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Donald S. Black, Judge.

Coleman & Horowitt, Eliot S. Nahigian, Charles Fredrick Meine III and Brandon A. Hamparzoomian for Objector and Appellant.

Baker Manock & Jensen, John G. Michael and Jeffrey A. Jaech for Petitioner and Respondent.

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Petitioner (decedent's stepdaughter) petitioned the probate court for an order construing the terms of decedent's testamentary trust. The judgment of final distribution, which established the trust and acted as the trust instrument, provided that decedent's widow was the income beneficiary for her life, and on her death, the remaining trust

estate was to be distributed to decedent's "children." Petitioner contended the term "children" was ambiguous, and decedent intended it to include his daughter and his two stepchildren. Decedent's daughter objected to the petition, contending "children" referred only to her, and she was the sole remainder beneficiary. At trial, the trial court took testimony and other evidence; the evidence that decedent intended his daughter and his two stepchildren to share equally in the remainder of the trust estate was uncontradicted. The trial court entered an order construing the term as requested by petitioner. Decedent's daughter appeals. We conclude the trial court correctly construed the trust instrument and affirm the judgment construing trust instrument.

FACTUAL AND PROCEDURAL BACKGROUND

Dennis I. Watson (decedent) died on July 13, 1991. His widow, Mary Watson (Mary),[1] was named executor of his will. With the assistance of a paralegal, Mary petitioned for final distribution of the estate, and the trial court entered a judgment of final distribution and final distribution to testamentary trust (judgment) in 1992. The judgment distributed the residue of decedent's estate to a testamentary trust, of which Mary was the trustee and the income beneficiary during her life. The judgment provided that, upon Mary's death, the trust estate was to be divided "into as many equal shares as there are children of decedent then living and children of decedent then deceased leaving issue then living." One share was to be allocated "to each living child" and each group of issue of a deceased child. The trust estate consisted primarily of decedent's one-half community property interest in 140 acres of real property, which he and Mary owned and on which they had lived and operated a farm.

In 2014, more than 20 years after the judgment was entered, Mary learned that, due to the omission from the judgment of certain language of decedent's will defining the

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[1] We refer to the parties by their first names for clarity and convenience, because some of them share a last name or have multiple last names. No disrespect is intended.

term "children," the judgment could be construed to provide that, on Mary's death, the trust would be distributed only to decedent's biological daughter from a previous marriage, Cynthia, to the exclusion of decedent's stepchildren (Mary's children), Kimberly and Martin. To remedy this mistake, Mary filed a petition seeking to correct a clerical error in the judgment by a nunc pro tunc order. The trial court granted the petition and amended the judgment to add the omitted language. Cynthia appealed and we reversed the order, finding the error was not a clerical error that could be corrected nunc pro tunc after finality of the judgment. (*Watson v. Watson* (Apr. 29, 2016, F071927, F072303) [nonpub. opn.].)

Kimberly subsequently petitioned the trial court for construction of the trust instrument. (Prob. Code, § 17200.) She alleged that, after decedent and Mary married, Kimberly and Martin lived with them as a family; decedent had a father-child relationship with them and considered them to be his children. Cynthia did not live with them. Decedent's July 11, 1991 final will provided that, upon Mary's death, the trust would be distributed to his "children"; that term was defined in the will to include his stepchildren, Kimberly and Martin. The holographic will decedent prepared eight days before executing his final will provided that, on the death of Mary, the trust estate was to be distributed to decedent's "child, Cynthia," and his "step-children, Martin … and Kimberly … in equal shares." The judgment, which established the testamentary trust, referred to the "children of decedent," but omitted the definition of that term. Kimberly alleged the term was ambiguous and sought to have the court construe it to include all three of the children, Cynthia, Kimberly, and Martin, as remainder beneficiaries.

Cynthia objected to the petition for construction. After a three-day trial, the trial court entered a judgment construing trust instrument, which concluded the terms "children of decedent" and "child of decedent," as used in the trust instrument, were ambiguous; based on the extrinsic evidence submitted, it construed them to refer to

Cynthia, Kimberly, and Martin. Cynthia appeals from the judgment entered on the petition for construction of the trust instrument.

DISCUSSION

I. Standard of Review

" 'The meaning and effect of a judgment is determined according to the rules governing the interpretation of writings generally.' " (*In re Marriage of Richardson* (2002) 102 Cal.App.4th 941, 948–949.) The meaning of a judgment or court order is a question of law, which we review de novo, unless interpretation turns on the competence or credibility of extrinsic evidence, or a conflict in the evidence. (*In re Ins. Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1429; *Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 452–453.) When the interpretation turns on the credibility of conflicting extrinsic evidence that was properly admitted at trial, we will uphold any reasonable construction of the instrument by the trial court. (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 913.)

II. Construction of the Judgment

A. Effect of prior litigation

After the trial court entered an order that the judgment be amended nunc pro tunc to include the definition of children found in the will, Cynthia appealed from that order and the amended judgment. We reversed. Cynthia now contends our opinion in that appeal interpreted the judgment and determined the term "children" included only decedent's daughter, Cynthia, and did not include his stepchildren. Cynthia also asserts Kimberly is precluded by collateral estoppel from relitigating that interpretation of the judgment.

In our opinion in the prior appeal, we summarized the issue and our decision in the introductory paragraph: "In this probate proceeding, appellant appeals from a nunc pro tunc order correcting an alleged clerical error in the judgment of final distribution entered in 1992. We conclude the error was not a clerical error that the trial court could correct at

any time by a nunc pro tunc order." (*Watson v. Watson*, *supra*, F071927, F072303.) We discussed whether the judgment as entered was the judgment as rendered by the trial court, because " '[t]he function of a nunc pro tunc order is merely to correct the record of the judgment and not to alter the judgment actually rendered.' " (*Estate of Eckstrom* (1960) 54 Cal.2d 540, 544, italics omitted.) We noted the trial court judge signed the proposed judgment submitted by Mary without change, and there was no evidence he rendered or intended to render some other judgment. We briefly addressed Mary's argument that correction of the judgment was proper because it effectuated the decedent's intent:

> "When a request is made to correct a clerical error in a judgment, the issue is whether the judgment as entered reflected the judgment actually rendered by the trial court, not whether the judgment effectuated the testator's intent. [¶] … [¶]
>
> "To amend the judgment [22] years after it was entered in an attempt to conform it to the testator's intent would be to change the substance of the judgment based on what the trial court hearing the matter now believes the trial court ought to have done originally. This it cannot do through a nunc pro tunc order purporting to correct a clerical error in the judgment." (*Watson v. Watson*, *supra*, F071927, F072303.)

Thus, the issues addressed and decided in the prior appeal were whether the error Mary sought to have corrected was a clerical error and whether the trial court abused its discretion by entering a nunc pro tunc order adding language to the judgment, purportedly to correct a clerical error. We were not asked to, and did not, determine the meaning of any of the terms used in the judgment, including "children of decedent." While Cynthia asserts we did decide the meaning of that term in the prior appeal, she does not cite us to any portion of the opinion supporting that claim.

Cynthia also baldly asserts that all four elements of collateral estoppel are present, but fails to identify any of the elements, or to point to anything in the record demonstrating they are present and bar the order construing the language of the judgment.

Collateral estoppel, also known as issue preclusion, "prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.) It "applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*Id.* at p. 825.) As we have already stated, the issue of the meaning of the terms used in the judgment, including "children of decedent," was neither litigated nor decided in the prior appeal. Consequently, at least two of the elements of collateral estoppel (identical issue, actually litigated and decided) are absent. Cynthia has not demonstrated the judgment construing the trust instrument was barred by collateral estoppel.

B. Extrinsic evidence

"A decree of distribution is a judicial construction of the will arrived at by the court ascertaining the intent of testator. [Citations.] Once final, the decree supersedes the will [citations] and becomes the conclusive determination of the validity, meaning and effect of the will, the trusts created therein and the rights of all parties thereunder." (*Estate of Callnon* (1969) 70 Cal.2d 150, 156, fn. omitted.) "It is well settled that 'where the decree of distribution is contrary to the provisions of the will, the decree controls and prevails over the terms of the will with respect to the distribution of the property.' [Citations.] Only if the language of the decree is 'uncertain, vague or ambiguous' [citation] may resort be had to the will to interpret but not to contradict the decree." (*Id.* at p. 157.) When the judgment is ambiguous, the will upon which it was based may be admitted to clarify the judgment. (*Estate of Freeman* (1956) 146 Cal.App.2d 49, 57.) Courts also "look to the will in construing the decree where … the decree repeats the terminology of the will." (*Estate of Joslyn* (1995) 38 Cal.App.4th 1428, 1431, fn. 2, overruled on another ground in *Newman v. Wells Fargo Bank* (1996) 14 Cal.4th 126, 140.)

The court's primary object in construing the provisions of a judgment of distribution is to determine and effectuate the testator's intent. (*Estate of Ferry* (1961) 55 Cal.2d 776, 782 (*Ferry*).) Extrinsic evidence may be admitted to assist in construing a written instrument, when its language is ambiguous. (*General Motors Corp. v. Superior Court* (1993) 12 Cal.App.4th 435, 441.) "An ambiguity exists in a written instrument when its language is properly susceptible to multiple constructions." (*Estate of Newmark* (1977) 67 Cal.App.3d 350, 355.) " 'The test of whether parol evidence is admissible to construe an ambiguity is not whether the language appears to the court unambiguous, but whether the evidence presented is relevant to prove a meaning to which the language is "reasonably susceptible ...." ' " (*General Motors Corp. v. Superior Court, supra,* at p. 441, fn. omitted.) A two-step process applies: " 'First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine "ambiguity," i.e., whether the language is "reasonably susceptible" to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is "reasonably susceptible" to the interpretation urged, the extrinsic evidence is then admitted to aid the second step—interpreting the contract.' " (*Ibid*.)

The judgment distributed the residue of decedent's estate to Mary, in trust, "to be held, administered and distributed in accordance with the provisions of Paragraphs SIXTH, SEVENTH and EIGHTH of decedent's WILL." Those paragraphs were then set out in the judgment in substantially the same language used in the will. Paragraph Sixth provided for a trust, with net income payable to Mary during her lifetime. Upon Mary's death, "the Trustee … shall divide the trust estate into as many equal shares as there are children of decedent then living and children of decedent then deceased leaving issue then living. The Trustee shall allocate one such equal share to each living child of decedent and one such equal share to each group composed of the living issue of a deceased child of decedent." The judgment did not identify any "child of decedent" or "children of decedent" by name, nor did it define those terms.

Extrinsic evidence presented at trial identified Cynthia as decedent's biological child, and Kimberly and Martin as his stepchildren. The trial court found ambiguity in the terms "children" of decedent and "child" of decedent, as used in the trust instrument established by the judgment, based on the following: (1) the terms were not defined in the judgment; (2) no one was identified in the judgment as a "child" of decedent; (3) the term "children" was plural, suggesting it referred to multiple persons; and (4) the terms "child" and "children" are sometimes used to describe persons who share no blood relationship with the testator.

Cynthia seems to assert that, in the absence of a definition in the judgment of the term "children" that includes the stepchildren, there is no ambiguity in the term, and on its face, it includes only decedent's biological child. However, if a judge determines solely from the face of the instrument that a term used is unambiguous, " 'his decision is formed by and wholly based upon the completely extrinsic evidence of his own personal education and experience.' " (*Estate of Russell* (1968) 69 Cal.2d 200, 209.) Thus, in the initial stage of the analysis—determining whether there is an ambiguity in the instrument that requires construction—the trial court must consider extrinsic evidence offered on that issue.

Cynthia essentially concedes there is an ambiguity in the term "children" that may be resolved by consideration of extrinsic evidence, which she terms "external facts." She admits the judgment does not identify any individual as a child of decedent; therefore, she looks to extrinsic evidence to establish that she is decedent's child and Kimberly and Martin are his stepchildren. Cynthia contends we cannot look at extrinsic evidence beyond the fact she is decedent's only biological child, because the purpose of considering other evidence would be "to alter or vary the terms of the Judgment." We disagree. Considering extrinsic evidence to determine whether the judgment contains an ambiguity does not alter or vary the terms of the judgment. Once an ambiguity is identified, extrinsic evidence is admissible to resolve the ambiguity, that is, to give the

language a meaning to which it is reasonably susceptible, not to contradict it. (*Estate of Russell*, *supra*, 69 Cal.2d at p. 211; see also Code Civ. Proc., §§ 1856, subds. (a), (g), (h), 1860.)

In some cases, terms such as "child," "children," or "issue" have been determined to be ambiguous and subject to construction. For example, in *Newman*, the trustee of a testamentary trust petitioned the court for instructions to determine whether Newman, the natural son of the testator's nephew, fell within the categories of "children" and "issue" of the testator's nephew, even though Newman had been adopted by his stepfather. (*Newman v. Wells Fargo Bank*, *supra*, 14 Cal.4th at pp. 129–130.) The court stated: "[O]therwise unambiguous terms such as 'child,' 'children,' or 'issue' may be ambiguous in the context of a particular will and the circumstances in which the will was executed. Thus, while these terms are not ambiguous in most cases and the ordinary use of words must be considered … when a child has been adopted into or out of the testator's family, and the will is not specific with regard to the rights of the adopted child, a latent ambiguity exists." (*Id*. at p. 134.) The court noted that, "as with any written instrument, the court must attempt to ascertain the intent of the testator by examining the will as a whole and the circumstances at the time of its execution." (*Ibid*.)

In *Estate of Brown* (1962) 199 Cal.App.2d 274, which also addressed a petition for instructions by the trustee of a testamentary trust, the court stated: "It is true that the words 'children' and 'grandchildren' will be interpreted in their ordinary restricted sense where nothing in the will and attendant circumstances indicates a different meaning. [Citation.] However, when the words of a will, read in the light of the attendant facts, reasonably show intent to give the broader meaning of descendants, the courts will not hesitate to give such broader construction when it will effectuate the intent of the testatrix." (*Id*. at p. 282.) To "give full effect to all of the words of the will," the court interpreted "the terms 'children' and 'grandchildren' as contained in the dispositive portions of the will in the broader sense of lineal descendants." (*Id*. at pp. 282–283.)

In *Estate of Careaga* (1964) 61 Cal.2d 471, the court found ambiguity in the meaning of the word "children," as used in the decree of distribution. (*Id.* at p. 476.) "Although 'children' ordinarily means offspring of the first degree, the word is sometimes used to denote all descendants. The question is how was it used in the original decree. In the instant case the intended meaning of 'children' is uncertain because the word is used in some instances to mean offspring of the second as well as the first degree." (*Ibid*.) The reviewing court then looked to the entire record, specifically to the will itself, to determine the meaning of the term. (*Id*. at pp. 477–478.)

The threshold determination regarding whether there is an ambiguity in the judgment is a question of law, which we review de novo. (*City of Chino v. Jackson* (2002) 97 Cal.App.4th 377, 383.) In light of the evidence that decedent had both a daughter and stepchildren, and the latter lived with him as part of his family while they were minors, the term "children," as used in the trust provisions of the judgment, was susceptible to the interpretation that it was intended to include decedent's stepchildren. Consequently, the trial court correctly determined the term was ambiguous, and extrinsic evidence was admissible to determine what meaning was intended by decedent when he used the term in his will.

At the second stage of the analysis—resolving the ambiguity in the instrument by determining the meaning of the ambiguous term—the court's primary object is to determine and effectuate the testator's intent. (*Ferry*, *supra*, 55 Cal.2d at p. 782.) Use of extrinsic evidence to explain an ambiguity or interpret the terms of an instrument, as the trial court did in this case, is permitted. (Code Civ. Proc., § 1856, subd. (g); *Houghton v. Kerr Glass Mfg. Corp*. (1968) 261 Cal.App.2d 530, 536.) While a judgment of distribution, after it is final, cannot be attacked on the ground that it did not properly construe the will upon which it was based, the will is admissible to clarify the judgment when the judgment is ambiguous. (*Estate of Freeman*, *supra,* 146 Cal.App.2d at pp. 57–58.)

The trial court admitted extrinsic evidence as an aid in construing what the testator intended by his reference to his "children" in the trust provisions of the will. There was evidence Mary's original family (Mary, her first husband, Kimberly, and Martin) and decedent's original family (decedent, his first wife, and Cynthia) were friends prior to the marriage of decedent to Mary; Kimberly and Martin testified they had known decedent all their lives. Decedent and Mary were divorced from their respective first spouses, and they married each other in December 1976. At that time, Martin was 15 years old, Kimberly was 13, and Cynthia was 14. Kimberly and Martin lived with decedent and Mary. Cynthia lived with her mother but visited decedent and Mary on holidays. There was evidence Kimberly, Martin, and Cynthia all had close relationships with decedent. A longtime friend of decedent, who also acted as a witness to his final will, testified that decedent "always said that he wanted his property, if anything happened to him and Mary, to go to the three children."

Decedent's July 11, 1991 will provided, in paragraph Second, which was not included in the judgment: "I have one (1) child now living, whose name is Cynthia …. I have two (2) stepchildren now living whose names are Martin … and Kimberly …. [¶] … The terms 'my child' and 'my children' as used in this Will shall include my child and my stepchildren, as named above …." Decedent's holographic will, dated July 3, 1991, directed that a portion of decedent's estate was to be placed in a trust, and provided: "The Trust is to terminate at the death of my spouse, and the remainder of the Trust estate shall be distributed to my child, Cynthia … , and to my step-children, Martin … and Kimberly … , in equal shares." Decedent's will from 1983 stated, " I have three children living whose names … are as follows," then listed the names of Martin, Kimberly, and Cynthia.

The trial court found decedent intended the reference to his "children" to include Cynthia and his stepchildren, Martin and Kimberly. It found the extrinsic evidence established Kimberly and Martin had a close relationship with decedent, both while

Kimberly and Martin lived with decedent and Mary, and subsequently. Decedent's 1983 will referred to Kimberly, Martin, and Cynthia as his "children," and his holographic will left the residue of the trust estate to the three of them in equal shares. Decedent's final will expressly defined the terms "my child" and "my children," as used in the will, to include his stepchildren. The trial court also noted that, by conceding Mary or her paralegal made a mistake by submitting to the trial court a proposed judgment of distribution that did not conform to the terms of decedent's final will, Cynthia also conceded "the critical point that the [j]udgment as entered did not conform to [decedent's] intent as expressed in numerous writings including the will upon which the [j]udgment was based."

We conclude substantial evidence supports the trial court's findings regarding the closeness of the relationship between decedent and his stepchildren, Kimberly and Martin, and decedent's intent as expressed in his wills. We conclude the trial court properly used the extrinsic evidence, including the content of the final will, to construe the ambiguous language of the judgment, and not to contradict the judgment. There was sufficient evidence, including the undisputed provisions of decedent's July 11, 1991 will (which defined the term "children" to include decedent's stepchildren), to resolve the ambiguity in favor of Kimberly's interpretation that the term included Cynthia, Martin, and Kimberly. We find no error in the trial court's interpretation of the terms "children of decedent" and "child of decedent," as those terms were used in the judgment.

Cynthia argues that the standard of review is de novo, citing cases holding the de novo standard applies to construction of a written instrument when no extrinsic evidence is admitted or when the extrinsic evidence is uncontested. (*Estate of Powell* (2000) 83 Cal.App.4th 1434, 1439; *Wells Fargo Bank v. Marshall*, *supra*, 20 Cal.App.4th at pp. 452–453.) The trial court admitted extrinsic evidence regarding decedent's intent, and Cynthia does not challenge its admission. Consequently, Cynthia appears to concede the evidence of decedent's intent was undisputed. The only evidence presented indicated

it was decedent's intent to include his stepchildren in the term "children." Cynthia did not present evidence of any other intent on the part of decedent. Applying a de novo standard of review, we agree with the trial court that decedent intended the term "children," as used in the trust provisions of the will and incorporated into the judgment, to refer to decedent's child, Cynthia, and his stepchildren, Martin and Kimberly.

Cynthia argues that the trial court impermissibly added language omitted from the judgment, rather than construing an ambiguity. She relies on Code of Civil Procedure section 1858, which provides in pertinent part: "In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted …." The trial court, however, did not insert any omitted term in the judgment. It construed an ambiguous term that was actually present in the judgment.

Callnon provides an example of an omission that could not be corrected by adding to the terms of the judgment. In *Callnon*, the testator left the residue of his estate in trust for his son, John, during John's life. (*Estate of Callnon*, *supra*, 70 Cal.2d at pp. 152–153.) On John's death, the trust was to terminate, and the trust estate was to go to the testator's sister, Anna. The decree of distribution, however, provided that, on John's death, the trust estate was to go to Anna, *if she survived John*. (*Id*. at p. 153.) Anna predeceased John. When John died, the trustee sought to distribute the trust estate to the heirs of the testator as if he had died intestate, because the decree made no provision for distribution of the trust estate if Anna did not survive John. (*Id*. at p. 154.) Anna's daughter objected, contending the decree was incomplete and therefore ambiguous, and should be interpreted by looking to the will for the testator's intent. (*Id*. at pp. 154–155.)

The court held that the decree of distribution was final, and it was not ambiguous, because it clearly provided that the trust estate would be distributed to Anna after John's death only if she survived him. The court concluded incompleteness was not ambiguity, so the court could not resort to the will to construe the decree. (*Estate of Callnon, supra*,

70 Cal.2d at p. 160.) Because Anna did not survive John, and there was no provision in the decree for that eventuality, the testator was deemed to have died intestate as to the remaining trust estate, and it was required to pass by intestate succession. (*Id*. at p. 161.)

Similarly, in *Estate of Townsend* (1963) 221 Cal.App.2d 25, the decedent's will established a trust for the son of her niece, Violet, with a contingent remainder to Violet if she survived her son; it also left to Violet "all of the balance of furniture, linens, dishes and personal effects." (*Id*. at p. 26.) The will made specific bequests to others, then stated the decedent "intentionally failed to make provision for my other living relatives," and "purposely provided as I have" for Violet, because Violet was close to her, cared for her, and asked for nothing. (*Ibid.*, italics omitted.) The will contained no provision disposing of the residue of the decedent's estate. Violet contended the language of the will should have been interpreted to leave the residue to her. (*Ibid*.)

The court stated: " '*A mistake of omission cannot be corrected*.… Correction would require the addition of a *new provision*, and the court cannot add anything to the will; a testamentary gift can only be made by the testator in writing.' " (*Estate of Townsend*, *supra*, 221 Cal.App.2d at p. 27.) Although the language of the will indicated the intent of the decedent to provide for Violet, there was "no wording in the will of a dispositive nature in Violet Wade's favor other than that related to 'personal effects' and that related to the trust for her son in which Violet was given a contingent remainder." (*Id*. at p. 28.) The defect was one of omission, not ambiguity, and it could not be corrected by the court. (*Ibid*.)

The defect in this case was not the omission of a disposition of the trust estate. The judgment provided that, upon Mary's death, the trust estate was to be divided among, and distributed to, the decedent's "children." The trial court addressed an ambiguity in the meaning of the term "children." It construed the term, in order to determine the individuals included in that category. The trial court construed a term actually used in the judgment, "simply to ascertain and declare what [was] in terms or in substance contained

[in the judgment], not to insert what [had] been omitted." (Code Civ. Proc., § 1858.) It did not add to the judgment. The trial court correctly construed the ambiguous term in the judgment.

C. Collateral attack on the judgment

Cynthia contends the petition to construe the trust instrument was an impermissible collateral attack on the judgment, and therefore must be reversed. "A direct attack has been narrowly defined as an attack on the judgment *in the action in which it was rendered*, as by a motion for a new trial or appeal. But it is more accurately described as a *proceeding instituted for the specific purpose* of vacating, reversing, or otherwise attacking the judgment." (8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 1, p. 583.) "A collateral attack is indirect. It is made not in a proceeding brought for the specific purpose of attacking the judgment … but in some other proceeding having a different purpose. There are no regular 'methods' of collateral attack; any procedural challenge that does not constitute a direct attack is collateral." (*Id.* at § 6, p. 590.) "A litigant may collaterally attack a final judgment for lack of personal or subject matter jurisdiction, or for granting relief that the court had no power to grant, but may not collaterally attack a final judgment for nonjurisdictional errors." (*Estate of Buck* (1994) 29 Cal.App.4th 1846, 1854.) "The significance of the distinction between direct attack and collateral attack … is this: If a judgment, no matter how erroneous, is within the jurisdiction of the court, it can only be reviewed and corrected by one of the established methods of direct attack." (8 Witkin, Cal. Procedure, *supra*, § 1, p. 583; see *Estate of Buck*, *supra*, at p. 1854.)

Kimberly's petition for construction of the trust instrument was not a proceeding to vacate, reverse, correct, or otherwise attack the judgment. Rather, as authorized by Probate Code section 17200, it was a petition seeking "construction of a trust instrument." (Prob. Code, § 17200, subd. (b)(1).) The judgment established the testamentary trust and set out its terms. The petition requested that the court interpret the

term "children of decedent," as used in the judgment, and identify the individuals within that category. The petition was not an impermissible collateral attack on the judgment.

D. Standing

Kimberly's petition for construction of the judgment was filed pursuant to Probate Code section 17200, which authorizes "a trustee or beneficiary of a trust" to petition the court to determine questions of construction of a trust instrument. (Prob. Code, § 17200, subds. (a), (b)(1).) Cynthia contends Kimberly lacks standing to bring such a petition, because she is not a beneficiary of the trust. The term " 'beneficiary,' " for purposes of a trust, "means a person who has any present or future interest, vested or contingent." (Prob. Code, § 24, subd. (c).) Cynthia asserts the "children of decedent" are the remainder beneficiaries of the trust, and only a natural or adopted child falls within that category. (Prob. Code, §§ 26, 6450.) She concludes she is decedent's only natural child, and therefore the only remainder beneficiary of the trust.

In construing a trust instrument or judgment of distribution, the primary object is to determine the testator's intent; "rules of construction must be carefully applied in context and as aids in determining the testator's intent." (*Ferry, supra*, 55 Cal.2d at p. 783.) The purpose of Kimberly's petition was to obtain the court's construction of the term "children," and determine whether Kimberly is a remainder beneficiary of the trust.

In the context of determining whether a party had standing to appeal an adverse ruling, the court has stated: "[E]ven if she did not have standing below, she would still be aggrieved by the trial court's ruling that she did not have standing. Thus, she would still have standing to appeal. [Citations.] Any other approach would improperly conflate standing to appeal with the merits. True, a vision of the world in which only litigants with meritorious appeals would have standing has some allure; in practice, however, it would mean we would regularly have to pass on the merits of an appeal in the context of a motion to dismiss, without the benefit of the record." (*In re Catherine H*. (2002) 102 Cal.App.4th 1284, 1294.)

In this case, Cynthia's argument regarding lack of standing conflates standing with the merits of Kimberly's claim. The only way to determine whether Kimberly had standing in the trial court to bring her petition was to determine the merits of her petition, by adjudicating whether she was a beneficiary of the trust. To preclude her from adjudicating the merits of her claim by finding she lacked standing to pursue it would have required the trial court to assume the conclusion that Kimberly was not a beneficiary, without a full opportunity to receive and consider relevant evidence on that issue. The trial court properly declined to do so. After trial, the trial court determined Kimberly was a beneficiary, and we have found no error in that outcome. Consequently, we reject Cynthia's contention Kimberly lacked standing to bring the petition for construction of the judgment.

DISPOSITION

The January 2, 2018 judgment construing trust instrument created by judgment of final distribution dated August 3, 1992, is affirmed. Kimberly is entitled to her costs on appeal.

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HILL, P.J.

WE CONCUR:

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LEVY, J.

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DETJEN, J.